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85-168

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

William L. Ginnodo, Petitioner

v.

Office of Personnel Management

PETITION FOR WRIT OF CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Submitted pro se

William L. Ginnodo

1512 E. Wing Street

Arlington Heights, IL 60004

312/398-6212

QUESTION PRESENTED

Whether the U.S. Office of Personnel Management in identifying the competitive areas to be used in separating employees in a reduction in force abused its discretionary authority when it isolated the petitioner in a one-person competitive area and thereby denied him the competition for retention provided to every other OPM employee during its agency-wide reduction in force.

TABLE OF CONTENTS

Page

Opinions Below..... 2

Jurisdiction..... 2

Statute Involved..... 3

Statement of Case..... 3

Reasons for Granting Writ..... 6

Conclusion..... 12

Appendix A. Opinions and Decisions.

Ginnodo v. Office of Personnel Management, 753 F. 2d 1061 (Fed. Cir. 1985)..... A.1.1

Ginnodo v. Office of Personnel Management, Decision No. CH 03518210502, dated March 4, 1983, Chicago Regional Office, Merit Systems Protection Board... A.2.1

Ginnodo v. Office of Personnel Management, Docket No. CH 03518210502, undated Agency Response to Petition for Review..... A.3.1

Ginnodo v. Office of Personnel Management, Docket No. CH 03518210502, Order dated March 28, 1984, Merit Systems Protection Board, Washington, D.C..... A.4.1

Appendix B. Statutes, Regulations and Official Policy.

5 U.S.C. § 3502..... B.1.1

5 C.F.R. § 351.402..... B.2.1

Federal Personnel Manual, Chapter 351, Subchapter 2-2..... B.3.1

OPM Personnel Manual,
Chapter 351,
Subchapter 2-1..... B.4.1

TABLE OF CASES

Ginnodo v. Office of Personnel Management, 753 F. 2d 1061 (Fed. Cir. 1985)..... passim

Horne v. Merit Systems Protection Board, 684 F. 2d 155 (D.C. Cir. 1983)..... passim

Kellerman v. United States, 504 F. 2d 1121 (Ct. Cl. 1974)... 11

Smith v. United States, 151 Ct. Cl. 205, 208 (1960)..... 12

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PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William L. Ginnodo, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Federal Circuit entered in the

above titled case on February 4, 1985.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit is reported at 753 F. 2d 1061 (Fed. Cir. 1985) and is printed in Appendix A hereto, infra, page A.1.1. The decisions of the Merit Systems Protection Board, Chicago Regional Office, and the Merit Systems Protection Board, Washington, D.C., are printed in Appendix A hereto, infra, pages A.2.1 and A.4.1, respectively.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit was entered on February 4, 1985. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 (1). This jurisdiction is acknowledged in 5 U.S.C. § 7123 (d).

STATUTE INVOLVED

5 U.S.C. § 3502, the text of which is printed in Appendix B, supra, page B.1.1.

STATEMENT OF CASE

In 1982 the Office of Personnel Management (OPM) underwent a major agency-wide reduction in force (RIF). To determine which of its affected employees would compete for retention on the rolls, and to thereby identify those who would be released, either directly through RIF separation or by RIF-directed outplacement to other Federal agencies, the OPM took action to set up the competitive areas provided for in 5 C.F.R. § 351.402.

At the time it did so, the petitioner--a career employee of the OPM with in excess of twenty years of Federal service--was serving as a Management Analyst GS-343-15 with the agency's Washington-based Workforce Effectiveness and Development Group, but was geographically stationed in its regional office in Chicago. In accordance with its own policies for the establishment of competitive areas authorized by 5 C.F.R. § 351.402, the OPM optionally elected, under its discretionary authority, to utilize both his organizational component and his commuting area in determing his area of competition, and defined it as "Central Office Employees Located in the Chicago Metropolitan Area." This decision had the effect of placing him in a competitive area

comprising himself only, and when his position was subsequently abolished he was separated without competition.

The separation was effected on March 20, 1982. On April 9, 1982, the petitioner appealed to the Chicago Regional Office of the Merit Systems Protection Board (MSPB) under the provisions of 5 U.S.C. § 7701, arguing its impropriety on several grounds. Rejecting each of his arguments, the MSPB affirmed the agency's action in Decision No. CH 03518210502, dated March 4, 1983. A petition for a review of the MSPB decision, submitted to that agency's Washington office, was denied on March 28, 1984.

On July 16, 1984, serving as his own counsel, the petitioner then filed an appeal with the U.S. Court of Appeals for the Federal Circuit, pursuant to 5 U.S.C. § 7703. Acting on February 4, 1985, the Court affirmed the MSPB decision, Judge Newman dissenting.

REASONS FOR GRANTING WRIT

Ginnodo v. Office of Personnel Management, 753 F. 2d 1061 (Fed. Cir. 1985) and Horne v. Merit Systems Protection Board, 684 F. 2d 155 (D.C. Cir. 1983) deal with the abuse of authority granted by law to Federal agencies to determine the competitive areas to be used in separating employees from the rolls by reduction in force. Both decisions recognize that agencies are authorized by statute and regulation to exercise some discretion in defining such areas, but each established different criteria for showing that an agency has abused that authority.

In Ginnodo v. OPM, the appellant was required by the court to show "that he was being treated differently from his fellow employees," and because he had not done so, the

court found that abuse by the agency of its discretionary authority in establishing his competitive area was not demonstrated. The burden for proving abuse thereby passed to him, despite the fact that he was the only employee in his organizational component placed in a one-person competitive area, and as far as he knows, the only one so treated in the 6,000-plus person agency. Furthermore, the court overly narrowed the definition of abuse to situations where one employee is treated differently than other employees. In so doing, it did not recognize that abuse may involve other arbitrary decisions than differential treatment.

In Horne v. Merit Systems Protection Board, however, in ruling that the exercise of agency discretion in establishing competitive areas "clearly has its limits," the court held that "a competitive area may not be drawn so narrowly as to be virtually meaningless,"

without reference to the comparability of treatment of other affected employees, and on that basis expressly required an agency to bear the burden of proving that proper RIF procedures were followed.

The petitioner argues, therefore, that the court's decision in Ginnodo v. OPM conflicts in law with Horne v. MSPB in two significant respects: who carries the burden of proof to determine whether an agency's competitive area decision is an abuse of its discretion; and, whether abuse is defined only in terms of differential treatment. As a result of the court's ruling, he was denied a full and fair hearing because the court did not consider the merits of his case.

With respect to the facts of his case, the petitioner concedes that circumstances attending RIFs may in some instances produce properly constituted one-person areas of competition. He further recognizes that

neither statutes nor regulations guarantee him competition for retention as a matter of right. He contends, however, that their intent, and the intent as well of the agency's own personnel policies, is to fairly permit employees the opportunity to equitably compete for vacancies in their assigned organizational components whenever feasible.

Thus it is, by way of illustration, that agencies are required "to establish competitive areas in which employees compete for retention" (5 C.F.R. § 351.402 (a)); that agencies are directed to establish competitive areas that are "large enough to permit adequate competition among employees" (Federal Personnel Manual, Chapter 351, Subchapter 2, 2-2a at 351-11); and that "the area of competition for a particular action may be extended through granting assignment or bumping rights beyond the limits of the competitive area" (OPM Personnel Manual, Chapter 351, Subchapter 2 at

351-5 (1979)).

Implicit in these and other provisions of the cited references is the expectation that agencies will as a minimum preserve rather than restrict employee retention opportunities in RIFs, not only when such action is prescribed, but as a matter of course in the exercise of their discretionary authority. To reason otherwise is to suggest that discretionary authority carries with it the option to take actions contrary to competitive provisions of the law, regulations and the OPM policy.

In placing the petitioner in a competitive area limited to "Central Office Employees Located in the Chicago Metropolitan Area", the most competitively restrictive course open to it, the agency in effect declared him a non-person for RIF purposes, for by so doing it knowingly reduced to none his opportunity to compete with others. Since the thus predetermined result was his separation from

the rolls in a manner ultimately indistinguishable from preemptory dismissal, he contends that the agency arbitrarily and capriciously deprived him of his entitlement to fair and equitable treatment under the law. See Kellerman v. United States, 504 F. 2d 1128 (Ct. Cl. 1974).

The petitioner further argues that the OPM's action in his case--placing him in a situation that excluded him from competition with field employees because he was organizationally assigned to the agency's Washington office, while at the same time excluding him from competition with employees in Washington because he was stationed in the field--constitutes an abuse of discretionary authority of the kind cited in Horne v. MSPB, i.e., the designation of "a cometitive area . . drawn so narrowly as to be virtually meaningless." He also suggests as supportive of his argument the instance of abuse cited in

Smith v. United States, 151 Ct. Cl. 205, 208-209 (1960), quoted by Judge Newman in her dissenting opinion, which said of a plan that would put an employee "in the absurd position of having only himself to compete with in any future reduction in force," that such an employee "is entitled to different and better treatment."

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

William L. Ginnodo
1512 E. Wing Street
Arlington Heights, IL 60004

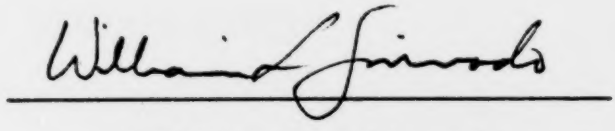
CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served, as per Supreme Court Rule 28.3. Three copies of this petition were mailed from Skokie, Illinois, on July 24, 1985, to each of the addresses shown below.

Mr. Stuart D. Rick, Esquire
Office of the General Counsel
U.S. Office of Personnel Management
Washington, D.C. 20044

The Honorable Robert E. Taylor
Secretary
U.S. Merit Systems Protection Board
Washington, D.C. 20419

Hon. Rex E. Lee
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530



William L. Ginnodo

APPENDIX A, WRIT OF CERTIORARI

United States Court of Appeals

for the Federal Circuit

WILLIAM L. GINNODO,

Petitioner, Appeal No.

v. 84-1243

OFFICE OF PERSONNEL MANAGEMENT,

Respondent,

DECIDED: February 4, 1985

Before NIES, NEWMAN, and BISSELL, Circuit Judges. BISSELL, Circuit Judge.

William L. Ginnodo appeals from the decision of the Merit Systems Protection Board, Docket No. CH03518210502 upholding the Office of Personnel Management's (OPM) action in separating Mr. Ginnodo under reduction in force (RIF) procedures which placed him in a one-person competitive area. We affirm.

BACKGROUND

Mr. Ginnodo was employed as chief of OPM's staffing division in Chicago, Illinois until September 1979 when he was temporarily reassigned to serve as a consultant to the Westinghouse Electric Corporation under the Presidential Executive Interchange Program. Upon his return, he was assigned to a Task Force as a management consultant for OPM's Central Office located in Washington, D.C. but was permitted to continue working in Chicago. By memorandum dated December 10, 1981, OPM clarified its RIF policy, by stating that all

employees of the Central Office whose duty locations were outside the Washington metropolitan area did not fall under the category of OPM "Field Offices" in those areas. Instead, the Central Office had several competitive areas because of geographic dispersion of employees, e.g., Boyers, Pennsylvania; Macon, Georgia; Charlottesville, Virginia; Oak Ridge, Tennessee; etc. In January 1982 the OPM notified Mr. Ginnodo that due to budgetary constraints requiring a reduction in force it intended to abolish his position. In March 1982 he was separated from the federal service. Mr. Ginnodo had been placed in a "competitive area" defined by OPM as "Central Office Employees located in the Chicago Metropolitan Area". Since Mr. Ginnodo was the only such employee and his position was eliminated, there was no position for which he could compete for retention. Mr. Ginnodo

argues that by denying him all opportunity to compete with other employees, OPM violated the provisions of 5 C.F.R. § 351.402 (1982) 1/ and its own policies for the establishment of competitive areas as clarified by the amended

---

1/ 5 C.F.R. § 351.402 is entitled "Competitive area" and provides as follows:

> (a) Each agency shall establish competitive areas in which employees compete for retention under this part.
>
> (b) The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the departmental service meets this standard when it covers a primary subdivision of an agency in the local commuting area. A competitive area in the field service meets this standard when it covers a field installation in the local commuting area.

text of that regulation.2/ The government counters that its actions were in accord with 5 C.F.R. § 351.402 which permits utilization of both the organizational unit and the commuting area.

2/ The amended text of paragraph (b) effective November 25, 1983, reads as follows:

> A competitive area may consist of all or part of an agency. The minimum competitive area in the departmental service is a bureau, major command, directorate or other equivalent major subdivision of an agency within the local commuting area. In the field, the minimum competitive area is an activity under separate administration within the local commuting area. A competitive area must be defined solely in terms of an agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined.

ISSUE

The sole issue raised on appeal is whether OPM improperly determined Mr. Ginnodo's competitive area.

OPINION

It is uncontroverted that OPM defined Mr. Ginnodo's competitive area in a way that resulted in his being its sole occupant Mr. Ginnodo does not dispute the propriety of a one-person competitive area, per se. It is his contention, however, that as a satisfactory tenured employee he should have been entitled to compete for retention under 5 U.S.C. § 3502 and that the agency violated this right by not taking positive actions prior to the RIF that would have placed him in an administrative unit large enough to afford him competition. More particularly, he argues that he was entitled to compete at least with the other members of the Task Force, all of whom were in Washington, D.C., and that his single position could not reasonably be designated as an

organizational unit.

This court has held that while the regulations promulgated pursuant to 5 U.S.C. § 3502 create retention rights among competing employees in a competitive area, they do not guarantee that there will be positions for which employees may compete. Grier v. Department of Health and Human Services, ___ F.2d ___, No. 84-1481, slip op. at 7 (Fed. Cir. Dec. 18, 1984). Mr. Ginnodo was therefore not entitled as a matter of right to actually compete with other employees for retention.

With respect to Mr. Ginnodo's argument that his position could not reasonably be designated as an organizational unit, the simple answer is that it was not. The organizational unit was the "Central Office". Further, under the regulations, an agency may use both organizational unit and commuting area in establishing a competitive area.

Contrary to Mr. Ginnodo's argument, a one-person competitive area is not limited to situations where there happens to be a one-person organizational unit. Thus, the subject competitive area was not in conflict with the regulations.

Neither was OPM under an obligation to take positive actions to place Mr. Ginnodo in a larger competitive area. As this court stated in Grier, ___ F. 2d at ___, slip op. at 5, "an agency may, but need not, expand the competitive area to provide actual competition. This is left solely to the agency's discretion . . ."

In order for Mr. Ginnodo to prevail on his right to competition argument, he must show a clear abuse of discretion on the part of OPM. See Cooper v. TVA, 723 F. 2d 1560, 1562 (Fed. Cir. 1983). To meet this burden, Mr. Ginnodo would have to show that the agency's decision was arbitrary or irrational,

e.g., in this case by showing that he was being treated differently from his fellow employees. See Smith v. United States, 151 Ct. Cl. 205, 208 (1960); Kellerman v. United States, 504 F. 2d 1128, 1132 (Ct. Cl. 1974). There was no showing to this effect. In fact, the record supports OPM's actions. Its memorandum of December 10, 1981 (three months prior to the date of Mr. Ginnodo's RIF notice), clearly sets forth that OPM's Central Office employees whose duty locations are outside of Washington did not fall under the category of OPM "Field Offices" and that the Central Office had several competitive areas based upon the geographic dispersion of its employees. Mr. Ginnodo made no showing that Central Office employees in any other geographic location outside of Washington were treated any differently than he was. He does contend that the employees in these outlying locations had other employees against which to

compete. That may well be, but so long as none of these competitive areas was expanded by OPM to provide actual competition, no abuse of discretion has occurred. See Grier, ____ F. 2d at _____, slip op. at 5-7. There being no evidence of such expansion, Mr. Ginnodo has not met his burden of showing that he was treated differently from other employees. Thus, the agency's decision as to his competitive area was not arbitrary, capricious, or irrational.

Since petitioner has shown no misconstruction of the statute, violation of applicable regulations, or abuse of discretion by the agency, we affirm.

AFFIRMED

United States Court of Appeals

for the Federal Circuit

WILLIAM L. GINNODO,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent,

Appeal No.

84-1243

NEWMAN, Circuit Judge, dissenting.

I respectfully dissent from the majority's affirmance of the Board's decision. Placing Mr. Ginnodo in a one-person competitive area, despite the flexibility to enable competition which the statute and regulations provide to the agency, disserves the policy and is contrary to the purpose of the official procedures governing RIFs.

OPINION

In addition to the C.F.R. sections cited by the majority, certain portions of the Federal Personnel Manual (FPM) and the OPM's internal regulations are relevant. The FPM regulations which implement 5 C.F.R. § 351.402 provide as follows:

> a. OPM standard. Each agency establishes competitive areas within which employees compete for retention under the reduction-in-force regulations. The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. Described geographically or organizationally, or both, the competitive area outlines the boundaries of reduction-in-force competition. The competitive area should be large enough to permit adequate competition among employees and limited enough to be administratively manageable. . . .
>
> b. Extent of area. . . . A competitive area need not be larger than a commuting area. When either a field installation or a departmental headquarters has components in more than one commuting area a separate competitive area may be established for each commuting area. An agency's

different activities, although located side by side, may be separate competitive areas if each is:

(1) under a separate administrative authority;

(2) independent of the others in operation, staff, work functions, and personnel administration; and

(3) separately organized and clearly distinguished from the others

FPM Ch. 351, subch. 2, 2-2.b, at 351-11 (1981).

OPM's implementing regulations are consistent with the CFR and FPM provisions:

2-1. Competitive Areas

A competitive area includes all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area at headquarters meets this standard when it covers a primary subdivision of an agency in a local commuting area. A competitive area in the field meets this standard when it covers a field installation in the local commuting area.

Competitive areas include employees in all grades in an organization or geographic area, not employees in only certain areas in an organization

> or geographic area. A competitive area may not be established on the basis of grade level or occupation. However, the area of competition for a particular action may be extended through granting assignment or bumping rights beyond the limits of the competitive area.
>
> In accordance with the above standard for establishing competitive areas, the following competitive areas are designated for purposes of reduction-in-force in OPM:
>
> a. Central Office
>
> All OPM offices in the Washington Metropolitan Area comprise a competitive area.
>
> b. Field Offices
>
> (1) All OPM organizations in a commuting area together comprise a single competitive area.

OPM Personnel Manual Ch. 351, subch. 2, at 351-5 (1979).

A December 1981 OPM memorandum applied these regulations to central office employees not located in Washington, D.C.; Mr. Ginnodo's competitive area in Chicago was defined in such a way that he was its sole occupant.

OPM asserts that the rules permit such a result, and that OPM was not obliged to use its discretion in order to avoid such a result. The import of the regulations and the statute, however, is to provide employees subject to a RIF with reasonable and fair opportunity to compete for other jobs within the agency. This is one of the guiding purposes of this procedure, in harmony with the purpose of aiding the agency to effect an orderly RIF. To this end the statute and regulations give the agency considerable discretion. The CFR provision requires each agency to "establish competitive areas in which employees compete for retention". 5 C.F.R. §351.402(a). The FPM regulation directs the agency to establish competitive areas that are "large enough to permit

adequate competition among employees". FPM Ch. 351, subch. 2, 2-2a, at 351-11. The OPM's internal regulation provides that "the area of competition for a particular action may be extended through granting assignment or bumping rights beyond the limits of the competitive area".

In deciding whether an administrative agency has abused its discretion, we "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment". Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted). I discern such error in the agency's treatment of Mr. Ginnodo. As our predecessor court commented in Smith v. United States, 151 Ct. Cl. 205, 208-09 (1960), concerning a plan that would put an employee

"in the absurd position of having only himself to compete with in any future reduction in force", such an employee "is entitled to different and better treatment".

In Mr. Ginnodo's situation, I deem it neither fair nor reasonable for the agency to have established a competitive structure which both excluded him from competition with field office employees in Chicago because he was affiliated with the central office, and excluded him from competition with central office employees because he was stationed in Chicago. It is my view that the agency made a clear error of judgment in refusing to exercise the discretion entrusted to it by the regulations to define Mr. Ginnodo's competitive area to ensure "adequate competition".

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

William L. Ginnodo	Decision Number:
v.	CH03518210502
Office of Personnel Management	Date: March 4, 1983

INTRODUCTION

By petition filed on April 9, 1982, appellant appealed an action separating him on March 20, 1982 by application of reduction-in-force procedures. Prior to his separation, appellant was employed as a management analyst by the Office of Personnel Management's Office of Productivity Programs, Workforce Effectiveness and Development Group (WED), with a duty station in Chicago, Illinois.

JURISDICTION

Section 7701 of title 5 of United States Code provides federal employees with the right of appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. Congress has provided, at 5 U.S.C. 3502, that the Office of Personnel Management (OPM) may prescribe regulations covering the release of competing employees in a reduction in force. The pertinent OPM regulations provide appellant (a former civilian employee in the Executive Branch of the Federal Government) with a right of appeal to the Board from the instant reduction in force 5 C.F.R. 351.901.

ANALYSIS AND FINDINGS

The record reveals that the appellant was employed as the chief of OPM's staffing

division in Chicago, Illinois until September of 1979, when he began work (under the "Presidential Executive Interchange Program") as a consultant for the Westinghouse Electric Corporation. Following completion of that program, he was reassigned (after he was first detailed to an unclassified position in OPM's Great Lakes Region) to the position he held at the time of his separation. The documentary evidence of record reflects that appellant was employed as a member of OPM's central office in Washington, D.C., but that he was permitted (in accordance with his own request) to work in a Chicago duty station.

On January 8, 1982, appellant was notified of the necessity, due to a lack of sufficient funding, to abolish his

position, and on January 25, 1982, he was issued a general notice of a reduction in force. This general notice was followed by a specific notice (dated March 3, 1982 and received by appellant on March 15, 1982) which advised him that he would be separated on March 20, 1982. This specific notice was amended by a March 18, 1982 notice, which advised appellant that his retention subgroup was IB, rather the IIB as stated in the previously-issued specific notice of reduction in force. I find that the above notices advised appellant that his separation was based on a lack of funding which would support the position he occupied. Appellant does not on appeal contest the legitimacy of the abolishment of his position or contend that the reduction-in-force was taken for reasons personal to himself, and I therefore find that the record shows that the agency properly

invoked the reduction- in-force regulation to abolish his position. See Rasheed v. Department of the Air Force, MSPB Order No. DA 035109023 (June 5, 1981); Losure v. Interstate Commerce Commission, 2 MSPB 366 (1980).

Appellant contests the propriety of the reduction-in-force action on several grounds. His first allegation is that the agency improperly notified him, in the specific notice of reduction in force, that his retention subgroup was IIB. As noted above, this error was cured by the agency prior to the effective date of the reduction in force. Moreover, the Board has adopted a "harmful error" analysis in evaluating claims of purported improprieties in agency reduction-in-force notices (See Butler v. Department of the Interior, MSPB Docket No. DC03518090084 (January 29, 1982), and

appellant has not shown that he was harmed by this error. I therefore find action should not be reversed on this basis.

Appellant also asserts that he was afforded less than 5 days specific notice of the reduction-in-force action. In particular, he argues that the agency improperly counted a Saturday as one of the 5 notice days.

5 C.F.R. 351.803 provides that when a general notice of an impending reduction in force is issued, the employee must have at least 5 days specific notice of the action to be taken in his case. 5 C.F.R. 351.203(b) defines "days" as "calendar days". In this case, I find that appellant was properly given 5 days specific notice of the separation action, and that the agency could have properly counted a Saturday as one of the 5

"calendar" notice days. Accordingly I find no error in this request, nor has appellant (even assuming error) made any showing of harm as a result of this agency procedure. I therefore find no basis for reversing the action based upon this argument.

Appellant next raises a series of related issues concerning the competitive area and the competitive level involved in this reduction in force. He argues that his competitive level was too narrowly defined (he was the only person listed on the retention register for his competitive level) because his agency improperly listed his competitive area as "central office employees located in the Chicago metropolitan area". He argues that he was the only person contained within this competitive area, that he was improperly denied any opportunity to compete with other agency employees (either in Chicago or in

Washington, D.C.) for retention on the agency's employment rolls, and that the agency violated the provisions of 5 C.F.R. 351.402 and its own policy (as reflected in a June 1, 1981 memorandum) concerning the establishment of competitive areas. The agency argues in response that it was inappropriate for appellant to compete in the same competitive area with Chicago employees since he was a central-office employee who was permitted, at his own request, to work in Chicago. It also argues that he could not compete with Washington, D.C. employees for retention in view of the regulatory provision (5 C.F.R. 351.403(b) which provides that a competitive area need not be any larger than a commuting area. Finally, it asserts that the agency memorandum cited by appellant was clarified (in a manner which supports the agency

position on this reduction in force) by a December 10, 1981 memorandum.

I will turn first to appellant's contention that the agency policy (as reflected in the referenced June 1, 1981 memorandum) supports a finding that since he was located in Chicago he should have been included in a competitive area which included other Chicago employees. The memorandum referenced by appellant was issued by OPM's Acting Director of Personnel, Ms. Lucretia Myers, in response to a concern that OPM's Executive Seminar Centers were being placed in the same competitive area with OPM's regional offices, and states, in pertinent part, that "all OPM organizations (i.e. "field offices") in a commuting area together comprise a single competitive area." As noted by the agency in its response to appellant's argument, this

memorandum was later clarified on December 10, 1981. The referenced December 10 memorandum, which was also authored by Ms. Myers, states that the first consideration in determining the competitive area is the jurisdiction of the servicing personnel office, and that central office employees who are not located in the Washington, D.C. commuting area are not a part of the "field office" for their local commuting area.

The reference December 10, 1981 memorandum clarifies the agency's June 10 admonition that the OPM field offices in a particular commuting area should be placed in one competitive area, and supports the action taken in this case to deny appellant the opportunity for placement in a competitive area with other Chicago-based OPM employees who did not work for OPM's central office. I further find that this agency policy is

consistent with pertinent OPM regulations. 5 C.F.R. 351.402(b) provides that a competitive area consists of all or part of an agency which is contained under a "single administrative authority". OPM has interpreted this regulatory provision as permitting different competitive areas "side by side" (in the same commuting area or even in the same physical facility) as long as the competitive areas are each" (1) under a separate authority; (2) independent of the others in operation, staff, work functions, and personnel administration; and (3) separately organized and clearly distinguished from the others." Federal Personnel Manual, Chapter 351, Subchapter 2-2(b),(d). Moreover, the Board has held in a finding consistent with these provisions, that it is proper for an agency to have more than one competitive area in one "geographical location" See

Lee v. Department of the Interior MSPB Docket No. SF 03518010091 (June 11, 1981). Since the undisputed record in this case reveals that appellant's position was under an authority separate from the regional OPM operations and that it was clearly distinguishable in that respect from the other regional office positions, I find that it was properly placed in a separate competitive area, and that appellant was not entitled to compete for retention with Chicago regional-office employees.

Appellant's contention that he should have been able, at a minimum, to compete for retention with Washington, D.C. employees is also without merit. As noted by the agency on appeal, the OPM regulations do not require an agency to establish a competitive area larger than the local commuting area. See 5 C.F.R.

351.402(b), (c); Federal Personnel Manual, Chapter 351, Subchapter 2-2(b). The competitive area for this reduction in force, therefore, quite properly consisted of all positions under a single administrative authority that were located in the Chicago commuting area. The fact that this resulted in the placement of appellant in what apparently was a one-person competitive area does not per se establish the impropriety of the agency's action. The propriety of a one-person competitive area has previously been suggested by the Board in its findings in Lee v. Department of the Interior, supra, in which the Board noted that the agency "may well have...prevailed" in its action establishing a one-person competitive area had it offered more than "bare assertions" in support of the propriety of its establishment

of the competitive area. See also Wilmot v. United States, 205 Ct. Cl. 666 (1974) (a case in which the court held-not-withstanding appellant's assertion that he was unable to compete for other positions in his competitive area - that the competitive area did not have to extend past the commuting area). In view of the lack of any legal basis for concluding that a one-person competitive level is per se improper and the establishment in this case of the competitive area in accordance with the pertinent regulatory provisions, I find that appellant's competitive area was properly established, and that he was was not entitled

to compete with headquarters' employees for retention. */

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*/Appellant notes in his argument that the agency has provided for "extended" areas of competition for certain of its employees (such as its regional directors - who compete for assignment rights to other regional directorships on a nationwide basis - and employees who are employed in certain "two-grade interval" positions - who are given assignment rights on a regional basis). An agency may, in its discretion, establish a competitive area larger than the local commuting area. 5 C.F.R. 351.402(c). In view of this provision and the general right of an agency to organize its workload needs, I find no error in this case when the agency, for purposes of this reduction in force, elected to not expand the competitive area beyond the local commuting area.

As referenced above, appellant also contends, that, based on the limitation of his competitive area, his competitive level was too narrow. A competitive level is comprised of all positions in the competitive area that are sufficiently similar so as to, in effect, be interchangeable. 5 C.F.R. 351.403(a). Appellant's competitive level was therefore comprised of all positions in the Chicago commuting area which were interchangeable with his position. Since the agency represents on appeal that appellant's position in Chicago was unique and appellant apparently agrees with this contention, I find that the agency properly placed appellant's position as the only one in his competitive level.

In summary, I find that the agency has established, by a preponderance of the evidence, the propriety of its action in separating appellant under the reduction-in-force regulations. I further find an absence

of any harmful error by the agency in its processing of the case.

DECISION

The reduction-in-force action is affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on April 8, 1983 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board, The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The petition for review must be filed with the

Secretary to the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than thirty-five (35) calendar days after the issuance of the initial decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b)(1), (as modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9) the appellant has the right to seek judicial review of the Board's final decision of this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

Stephen E. Manrose
Presiding Official

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD

WILLIAM L. GINNODO,

Appellant,

v.

Docket No.
CH03518210502

OFFICE OF PERSONNEL MANAGEMENT,

Agency,

AGENCY RESPONSE TO PETITION FOR REVIEW

PRELIMINARY STATEMENT

Appellant was separated by a reduction-in-force action, effective March 20, 1982, due to a lack of funding for the position he occupied. At the time of his separation, appellant was a central office employee of the United States Office of Personnel Management (OPM) in Washington, D.C., but (at his own request) appellant's duty station was in Chicago, Illinois.

In his appeal to the Chicago Regional Office of the Merit Systems Protection Board (Board), appellant claimed agency error with respect to his retention group, the length of his notice period, his competitive level, and his competitive area. The Presiding Official found no merit in any of appellant's claims, and affirmed the reduction-in-force action.

In his Petition for Review, appellant has abandoned the first three grounds of his appeal to the Board's Chicago Regional Office, claiming only that the Presiding Official's finding that appellant's competitive area was properly established and based on an erroneous interpretation of regulation and the Federal Personnel Manual (FPM).

ARGUMENT

A COMPETITIVE AREA IS PROPERLY ESTABLISHED SO LONG AS IT COVERS THAT PART OF AN AGENCY IN A

LOCAL COMMUTING AREA IN WHICH EMPLOYEES ARE ASSIGNED UNDER A SINGLE ADMINISTRATIVE AUTHORITY.

Under 5 C.F.R. 351.402(b), a competitive area must include all or that part of an agency in which employees are assigned under a single administrative authority. Furthermore, a competitive area need not be larger than a commuting area. FPM Chapter 351, subchapter 2-2(b).

It is proper for an agency to have more than one competitive area in one "geographical location". Lee v. Department of the Interior, MSPB Docket No. SF03518010091 (June 11, 1981). Moreover, so long as the competitive area meets the single administrative authority and commuting area criteria, it would be proper for a competitive area to have in it only one employee. Compton v. Department of Energy, MSPB Docket No. SL035109001 (October 8, 1980); Lee v. Department of Energy, supra. The "adequate competition" to be permitted in a

competitive area under the FPM is relative, and does not imply that in every case there must be an available position for the employee to compete for. O'Donnell v. Department of the Army, MSPB Docket No. DC03518110670 (August 23, 1982); Wilmot v. United States, 205 Ct. Cl. 666 (1974); Horne v. Merit Systems Protection Board, 684 F. 2d 155 (D.C. Cir. 1982).

In O'Donnell, supra, the appellant had argued that the construction of her competitive level had precluded her from the opportunity to compete. The Board found this allegation irrelevant, holding that a competitive area need not be larger than a commuting area, and that her competitive area had been properly established because it met the requirement that it include all or that part of an agency in which employees are assigned under a single administrative authority.

It is undisputed in this case that

appellant was a central office employee whose activity was separately organized and under administrative authority separate from the agency's regional operations in Chicago, independent of other activities at the regional office, and clearly distinguishable from them. It is likewise undisputed that Chicago is in a commuting area different from Washington, D.C., the other place where appellant claims should have been his competitive area.

CONCLUSION

Appellant's competitive area clearly meets the conditions set forth in the regulations and the FPM. Accordingly, OPM respectfully requests that the initial decision be sustained and the instant petition for review be denied.

Respectfully submitted

JOSEPH A. MORRIS
General Counsel

Stuart D. Rick
Agency Representative

A.3.6

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM L. GINNODO,

Appellant,

v.

Docket No.
CH03518210502

OFFICE OF PERSONNEL
MANAGEMENT,

Agency,

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on March 4, 1983, and finding that it does not meet the criteria for review set

forth at 5 C.F.R. § 12011.115, the Board hereby DENIES the petition.*/

This is the final order of the Merit Systems Protection Board in the appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113 (b).

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*/ The agency provided sufficient evidence to satisfy its burden of proof on the proper definition of the competitive area. See Lee v. Department of the Interior, 6 MSPB 561 (1981) (it is proper for an agency to have more than one competitive area in one geographical location.)

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

March 28, 1984
(Date)

Robert E. Taylor
Secretary

Washington, D.C.

5 U.S.C. § 3502. Order of retention

(a) The Office of Personnel Management shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to--

(1) tenure of employment;

(2) military preference, subject to section 3501(a)(3) of this title;

(3) length of service; and

(4) efficiency or performance ratings.

In computing length of service, a competing employee--

(A) Who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces;

(B) Who is a retired member of a uniformed service is entitled to credit for--

(1) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(ii) the total length of time in active service in the armed forces if he is included under section 3501(a)(3)(A), (B), or (C) or this title; and

(C) Who is an employee in or under the Department of Agriculture is entitled to credit for service rendered as an employee of a county committee established pursuant to section 590h(b) of title 16, or of a committee or an association of producers described in section 610(b) of title 7.

(b) A preference eligible described in

section 2108(3)(C) of this title who has a compensable service-connected disability of 30 percent or more and whose performance has not been rated unacceptable under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other preference eligibles.

(c) An employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other competing employees.

(Pub. L.89-554, Sept. 6, 1966, 80 Stat. 428; Pub. L. 90-367, §3, June 29, 1968, 82 Stat. 278; Pub. L. 90-623, §1(23), Oct. 22, 1968, 82 Stat. 1313; Pub. L. 95-454, title III, §307(e), title IX, §906(a)(2), Oct. 13, 1978, 92 Stat. 1139, 1224.)

5 C.F.R. § 351.402 **Competitive area.**

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) A competitive area may consist of all or part of an agency. The minimum competitive area in the departmental service is a bureau, major command, directorate or other equivalent major subdivision of an agency within the local commuting area. In the field; the minimum competitive area is an activity under separate administration within the local commuting area. A competitive area must be defined solely in terms of an agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined.

(c) When a competitive area will be in

effect less than 90 days prior to the effective date of a reduction in force, a description of the competitive area shall be submitted to the OPM for approval in advance of the reduction in force. Descriptions of all competitive areas must be made readily available for review.

Federal Personnel Manual, Chapter 351

Subchapter 2. Retention Factors

2-1. COVERAGE OF SUBCHAPTER

This subchapter covers the factors used to determine the retention standing of competing employees under the reduction-in-force regulations.

2-2. COMPETITIVE AREA

a. OPM standard. Each agency establishes competitive areas within which employees compete for retention under the reduction-in-force regulations. The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. Described geographically or organizationally, or both, the competitive area outlines the boundaries of reduction-in-force competition. The

competitive area should be large enough to permit adequate competition among employees and limited enough to be administratively manageable. An agency publishes both its initial designation of competitive areas and any subsequent changes in those areas.

b. Extent of area. The authority to take personnel actions is usually one factor in the extent of the competitive area. A competitive area need not be larger than a commuting area. When either a field installation or a departmental headquarters has components in more than one commuting area a separate competitive area may be established for each commuting area. An agency's different activities, although located side by side, may be separate competitive areas if each is:

(1) under a separate administrative authority;

(2) independent of the others in operation, staff, work functions,

and personnel administration; and

(3) separately organized and clearly distinguished from the others.

c. Departmental service. In the departmental service a bureau or its equivalent in the commuting area is an illustration of an organizational component that normally meets the criteria for a competitive area. Whatever it is called, however, it is a primary subdivision or component of the agency that is:

(1) separately organized and clearly distinguished from other components in work function and operation; and

(2) large enough to permit adequate competition among employees.

d. Field service. In the field service a competitive area is not ordinarily smaller than a field installation; that is, a field

activity which is independent of other activities of the agency in operation and work function in which employees are assigned under a single administrative authority. An agency may group two or more field installations into a common physical facility. If this physical grouping does not alter the organizational independence of the activities, and each is still a separate field installation, each may properly be designated a separate competitive area.

e. Larger or smaller competitive area. An agency may establish a competitive area larger than the one described in the standard without prior approval of OPM. With the prior approval of OPM an agency may establish a competitive area smaller than the standard. Agencies with delegated individual authority may establish competitive areas smaller than the standard without prior approval of OPM.

f. An agency may combine two or more competitive areas for initial competition in an enlarged competitive level or levels without combining the areas for assignment (see subchapter 4) between competitive levels. When an agency combines areas for initial competition only, it may limit competition for assignment between competitive levels to (1) the enlarged area; (2) a single competitive area; or (3) an area larger than a single area but smaller than the enlarged area.

SUBCHAPTER 2. MECHANICS OF REDUCTION-IN-FORCE

2-1. Competitive Areas

A competitive area includes all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area at headquarters meets this standard when it covers a primary subdivision of an agency in a local commuting area. A competitive area in the field meets this standard when it covers a field installation in the local commuting area.

Competitive areas include employees in all grades in an organization or geographic area, not employees in only certain areas in an organization or geographic area. A competitive area may not be established on the basis of grade level or occupation. However,

the area of competition for a particular action may be extended through granting assignment or bumping rights beyond the limits of the competitive area.

In accordance with the above standard for establishing competitive areas, the following competitive areas are designated for purposes of reduction-in-force in OPM:

a. **Central Office**

All OPM offices in the Washington Metropolitan Area comprise a competitive area.

b. **Field Offices**

(1) All OPM organizations in a commuting area together comprise a single competitive area.